BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	WT Docket 96-6
to Permit Flexible Service Offerings	)	
in the Commercial Mobile Radio Services	)	

COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA")[1], hereby submits its Comments in the above-captioned proceeding.[2]

INTRODUCTION AND SUMMARY

CTIA wholeheartedly endorses the Commission's proposals to liberalize the use of CMRS spectrum. Consistent with the proposals contained in the Flexible Use Notice, all CMRS providers should be permitted to provide fixed services without restriction.[3] This action will foster the further development of

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including cellular, personal communications services ("PCS"), enhanced specialized mobile radio, and mobile satellite services.

[2] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, Notice of Proposed Rulemaking in WT Docket 96-6, FCC 96-17 (released January 25, 1996) ("Flexible Use Notice" or "Notice").

[3] See Flexible Use Notice at ¶ 23; see also id. at ¶ 7 (FCC's discretion under 47 U.S.C. § 303 permits it to assign spectrum for multiple uses).

competition within the mobile services marketplace and more generally within the local exchange.

Although raised only implicitly in the Notice, CTIA believes that the Commission has the requisite authority to preempt state regulation of fixed services offered by CMRS providers. In amending the Communications Act's definition of "mobile services" in 1993,[4] Congress granted the Commission great flexibility to adjust the set of CMRS service offerings, including certain fixed services encompassed by the definition. This inclusive definition of "mobile services" places these services within the state rate and entry preemption provisions of Section 332[5] and bars intrusive state regulation.

Even were the fixed services at issue here not included within the definition of "mobile services" prior to the recent enactment of the Telecommunications Act of 1996, the 1996 Act supplies the requisite Commission authority to preempt state or local regulations which "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Thus, Section 332, viewed in conjunction with Section 253, operates to bar states and localities from interfering with the Commission's efforts to permit all CMRS providers to provide fixed services as part of their CMRS offerings.

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[4] 47 U.S.C. § 153(14).

[5] 47 U.S.C. § 332(c)(3)(A).

I. THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO PERMIT ALL CMRS CARRIERS TO PROVIDE FIXED SERVICES AS PART OF THEIR CMRS OFFERINGS.

The Flexible Use Notice proposes that all broadband CMRS providers be permitted to provide fixed wireless local loop services, and requests comment on whether other fixed services should be permitted as well.[6]

CTIA has long advocated the adoption of Commission policies which permit liberal, flexible use of spectrum, circumscribed only by the legal limits of the Commission's authority.[7] Flexible use leads to advances in efficiency, increases in competition, and improvements in consumer welfare. Thus, the Commission should permit all CMRS carriers to provide any fixed services.

The Flexible Use Notice reflects a recognition on the part of the Commission that the market is fully capable of ensuring that CMRS spectrum is put to the best, most efficient use, free

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[6] Flexible Use Notice at ¶¶ 13, 16, 22.

[7] See Comments of the Cellular Telecommunications Industry Association in Gen Docket 90-314, ET Docket 92-100, at 6-20 (November 9, 1992) (catalogs instances in which Commission has permitted flexible use of spectrum, in part, in recognition of the competitive benefits associated with such flexibility) ("CTIA PCS Comments"); see also Stanley M. Besen, Robert J. Larner and Jane Murdoch, Charles River Associates, "An Economic Analysis of Entry by Cellular Operators into Personal Communications Services," a study prepared for CTIA and submitted with CTIA's PCS Comments (November 1992), at 25-28 ("the holder of a spectrum assignment should not be 'restricted in the use to which his [allocation] may be put . . . .'" (citation to A.S. De Vany, R.D. Eckert, S. Enke, D.J. O'Hara, and R.C. Scott, Electromagnetic Spectrum Management, TEMPO, General Electric Company, Santa Barbara, CA, August 1968, p 37.)

from government oversight.[8] That is, the CMRS market is sufficiently competitive to permit market forces to determine the best use of spectrum.[9] The market will ensure that demand for mobile services is met, without government intervention. It also will ensure that spectrum licensed for CMRS services only will be used for fixed services when it is efficient to do so.

Permitting all CMRS providers to offer appropriate fixed services is consistent with the regulatory parity requirements of Section 332.[10] To ensure that similar services are subject to similar regulation and not disparate regulatory treatment as Section 332 requires, all CMRS services should be permitted to

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[8] This proposed flexibility of use is also entirely consistent with the tenets of Section 332, which favor market-place based solutions over government fiat. See Flexible Use Notice at ¶ 14.

[9] See FCC News Release, "Chairman Hundt Says Telecom Bill Will Spur Genuine Competition; Urges More Uses of New Spectrum and Information Technology" (Feb. 2, 1996) ("'Our spectrum policy should be to make more spectrum available to the private sector, as quickly as possible, and to provide wide latitude for market forces to guide that spectrum to its highest-valued use. By relying on market forces and flexible uses, we not only foster innovation and competition, but also stimulate infrastructure investment, job creation, and efficient spectrum use. This is the lesson of PCS, and we intend to adopt it as a blueprint for the future.'")

[10] 47 U.S.C. § 332. Congress specifically amended Section 332 in 1993 to ensure that "services that provide equivalent mobile services are regulated in the same manner." H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 259 (1993) ("House Report"). For this reason, Congress established "uniform rules" to govern CMRS offerings and directed the Commission "to review its rules and regulations to achieve regulatory parity among services that are substantially similar." Id.

provide fixed services without restriction.[11] Because of the dynamic nature of CMRS, permitting greater flexibility for broadband versus narrowband services (or for that matter PCS and not cellular or SMR) could effectively deter the development and evolution of such services. As such efficiency-reducing regulatory actions are among those that Congress disfavored, it would be good policy to extend the right to flexible spectrum use to all CMRS carriers.

This action also would streamline the Commission's regulatory processes by obviating the need for waivers or other regulatory proceedings, speeding the introduction of innovative services, and reducing administrative costs.[12]

In essence, the Notice continues Commission efforts to remove unnecessary restrictions on the use of licensed spectrum consistent with the Congressional preference for market-based solutions. Moreover, it reflects a recognition that for wireless

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[11] See Flexible Use Notice at ¶ 18 (requesting comment upon whether flexible use concept should be extended to narrowband CMRS).

[12] See Flexible Use Notice at ¶ 9. See also National Telecommunications and Information Administration, U.S. Department of Commerce, U.S. Spectrum Management Policy: Agenda for the Future, at 55-62 (February, 1991) (further citations included therein).; id. at 57 ("Administrative proceedings associated with the current [block allocation] system also can impose a considerable burden on potential innovators"); id. at 59 ("in order to encourage more efficient use, it may make sense to define blocks broadly, thus allowing users a range of spectrum options, without the delays associated with reallocation proceedings").

services to provide competition to the local exchange,[13] all unnecessary regulatory constraints, whether state or federal, must be removed.[14] For these reasons, the Commission should act quickly to liberalize current restrictions on CMRS provision of fixed services.[15]

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[13] Such action is fully consistent with Congress' vision of CMRS, considering that Section 332 contains specific examples of Congress' recognition of and providing for competitive entry by CMRS carriers into the local exchange market. See, 47 U.S.C. § 332(c)(3)(A) (regarding CMRS ability to become substitute for local exchange).

[14] See Flexible Use Notice at ¶ 1 ("The measures we propose should increase competition within wireless services and promote competition between wireless and wireline services."); see also Office of Technology Assessment, Congress of the United States, Wireless Technologies and the National Information Infrastructure, at 68 (July, 1995) (The FCC "may need to clarify the conditions under which wireless providers can provide fixed service. Without action on this issue, wireless will be unable to compete effectively in the market for local telephone service").

[15] CTIA agrees with the Commission's proposal to defer consideration of universal service obligations raised by this Notice to the universal service proceedings. See Flexible Use Notice at ¶ 21. The issues raised in this proceeding should receive full consideration in the upcoming universal service proceeding, as mandated by the Telecommunications Act of 1996. See 47 U.S.C. § 254 (requires comprehensive overhaul of universal service funding mechanisms; contains guidelines regarding which telecommunications carriers should contribute to universal service funding mechanisms and under what conditions).

Moreover, it is interesting to note as well that when Congress revised Section 332, it specifically contemplated that states should not be permitted to regulate CMRS provider rates based upon universal service concerns, unless the CMRS provider was the sole service provider in the relevant service area. See, 47 U.S.C. § 332(c)(3)(A).

As explained below, the Commission has the authority to liberalize the use of mobile services spectrum to include fixed use notwithstanding contrary state and local regulation.

II. THE COMMISSION SHOULD EXERCISE ITS STATUTORY AUTHORITY TO PREEMPT STATE REGULATION OF CMRS CARRIER-PROVIDED FIXED SERVICES.

The Flexible Use Notice proposes to "treat fixed wireless local loop services as an integral part of the CMRS services offered by a CMRS provider, so long as the carrier otherwise offers interconnected, for-profit mobile service to the public on licensed CMRS spectrum."[16] CTIA favors this approach. As the Commission recognizes, such comprehensive regulatory treatment will ensure that regulatory obstacles and disparities, including those created by state regulation, do not arise to inhibit the full development of CMRS. As described below, there are complementary jurisdictional bases for the Commission to preempt state regulation of CMRS carrier-provided fixed services.

A. The Definition of Mobile Services is Sufficiently Flexible to Include CMRS Provision of Fixed Services.

Section 332, including the state rate and entry preemption provisions of Section 332(c)(3)(A), is directed to the regulation of mobile services. Thus, a Section 332 analysis depends upon whether the subject service qualifies as a "mobile service." As demonstrated below, Congress granted the Commission sufficient latitude to define mobile services such that it may cover fixed services as well. Because the "mobile services" definition is

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[16] Flexible Use Notice at ¶ 20.

sufficiently broad to include the provision of fixed services, the state rate and entry preemption provisions of Section 332 apply to preempt any state regulation of CMRS carrier fixed services offerings.

The Act defines a mobile service as a:

> radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communications services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any services for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding."[17]

Several points are relevant to an analysis under this definition.

First, this definition has existed for years without challenge against a regulatory backdrop in which the Commission permits fixed services to be provided by mobile carriers (who are regulated as mobile carriers), albeit on an ancillary, secondary, incidental or auxiliary basis. Thus, the Commission's proposal to permit CMRS providers to provide fixed services on a co-primary basis with mobile services is not necessarily radical or revolutionary in nature. It simply represents the evolution and maturation of mobile services, as they develop in response to consumer demand and constantly improving technological opportunities to provide competitive local loop and other fixed

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[17] 47 U.S.C. § 153(14).

services. This is not a situation, nor is the Commission's proposal designed, to permit mobile carriers to eschew any existing service obligations they have to their customers. Rather, this proposal permits CMRS carriers the flexibility to immediately respond to market demand with a full set of service offerings.[18]

Moreover, the Commission's flexible use proposal has Congress' imprimatur. In its 1993 revision to the "mobile services" definition, Congress supplemented the existing

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[18] Wireless carriers have employed fixed wireless technology in a myriad of ways. Among the business applications is an ALLTELL Mobile system used to irrigate farm land so that a farmer can start, stop, and change directions of an irrigation system. In Virginia, Sprint Spectrum's system is used to keep track of humidity, temperature, and electrical systems in barns to prevent spoilage caused by temperature variations. Wireless technology is also used in combination with point of sale terminals found in retail stores, outdoor concessions, kiosks, ski areas, and national parks. For example, Coca-Cola Bottling, in association with Skywire L.P., has established a vending-management system in Tennessee which transmits sales and maintenance data (e.g., which machines need to be re-stocked, the number of bottles needed) from individual vending machines to the bottling plant. The system also creates reports on cash accountability, truck loads, and market research.

CommNet supplies wireless communications services to the Colorado Department of Transportation's 16 highway monitoring stations. Each station measures and reports vital traffic data, including usage trends used in calculating federal highway funding. Also, US West has requested approval from the FCC to provide cellular service to "held order" wireline customers, i.e., LEC customers who receive cellular service while awaiting installation of landline telephone service.

Moreover, since the passage of the 1996 Act, wireless companies are beginning to interconnect the nation's cellular digital packet data ("CDPD") networks. Recently, Bell Atlantic Nynex Mobile and Columbia Gas have joined forces using a CDPD network to maintain a 24-hour monitoring system that ensures the correct pipeline pressure and proper natural gas flow rates.

definition of "mobile services" by including: "**any services** for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), **or any successor proceeding**."[19] The House Report explained that it made "conforming changes" to the "mobile services" definition by "adding to it a definition of licensed personal communications services that the Commission would establish as part of its proceedings."[20] As the Conference Report further explicates, "mobile service" is defined to "clarify that the term . . . includes the licenses to be issued by the Commission pursuant to the proceedings for personal communications services."[21]

Moreover, in its deliberations, Congress considered and rejected the Senate's proposal to exclude fixed services from the definition of "mobile service." The Senate Amendment's proposed definition was identical to the House version with the one exception that "the term does not include rural radio service or the provision by a local exchange carrier of telephone exchange service by radio instead of by wire."[22] Importantly, the Conference agreement adopted the House definition, and not the

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[19] 47 U.S.C. § 153(14) (emphasis added).

[20] House Report at 262.

[21] H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 496 (1993) ("Conference Report").

[22] Id. at 497.

Senate Amendment. In other words, this very issue of whether to include fixed services within the "mobile services" definition was before the Congress in 1993, and it found in favor of flexible use.

To summarize, the statutory language, as further refined in the legislative history, reveals that the Commission was given express authority to classify which services should be considered "personal communications services," as well as to establish other definitions of "mobile services" in successor proceedings. Moreover, Congress specifically contemplated that "mobile services" could encompass fixed as well as mobile applications. This flexibility, in essence, permits the Commission to include fixed service offerings within the definition of mobile services as proposed in this proceeding.

In addition, there is further evidence that Congress was aware of, and approved of, opportunities to use wireless technology to provide local loop substitutes. Specifically, in commenting upon the states' authority to regulate CMRS providers for universal concerns, Congress noted that:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[23]

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[23] 47 U.S.C. § 332(c)(3)(A).

As the Conference Report clarifies:

> the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service **if subscribers have no alternative means of obtaining basic telephone service.** If, however, several companies offer radio service **as a means of providing basic telephone service** in competition with each other, such that consumers can choose among alternative providers of this service, **it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.**[24]

In other words, Congress specifically recognized, and approved of, wireless carriers providing "basic telephone service" in competition with wireline carriers. In fact, Congress only reserved the states' authority to regulate the rates charged by wireless carriers in the provision of such service if the wireless carrier was the sole local exchange services provider in the relevant geographic market. Importantly, the fact that wireless carriers use radio technology as the means to provide basic telephone service did not implicate the retention of state jurisdiction. This knowledge, coupled with Congress' granting the Commission the opportunity to define and redefine PCS, shows that Congress intended Section 332 to apply.

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[24] Conference Report at 493 (emphasis added).

B. The Commission Has Authority Under Section 332 to Preempt State Rate and Entry Regulation of CMRS Carrier-Provided Fixed Services.

Section 332(c)(3)(A) expressly preempts state regulation of CMRS entry and now rates.[25] It follows that states are prohibited from regulating the rates charged for, or the ability of a CMRS carrier to offer FCC-authorized fixed services employing CMRS spectrum.

Congress adopted the preemption provisions found in Section 332(c)(3)(A) primarily in recognition of the interstate nature of mobile services and the federal interest in fostering nationwide,

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[25] The common carrier provisions of Title II of the Act generally reflect a dual regulatory scheme with respect to telecommunications services, i.e., the Commission retains jurisdiction over interstate matters while intrastate regulation resides with the states. Specifically, section 1, 47 U.S.C. § 151, grants the Commission jurisdiction over interstate telecommunications matters. The Communications Act specifically reserves to the states "jurisdiction with respect to . . . charges, classifications, practices, services, facilities [and] regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). However, with respect to mobile services, state jurisdiction is explicitly limited by Section 332.

In accordance with Section 332, no state is currently permitted to regulate CMRS rates as the Commission earlier last year denied all state petitions to continue current CMRS regulation. See, e.g., Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana, Report and Order in PR Docket 94-107, 10 FCC Rcd 7898 (1995).

seamless wireless networks as part of the NII.[26] Specifically, Section 332(c)(3)(A) provides in relevant part:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

Thus, the statute provides that states have no authority over rates charged by CMRS providers, nor can states regulate CMRS entry.[27] For this reason, state regulation of CMRS carrier provision of fixed services would necessarily be curtailed. Moreover, as explained in the next section, Section 253 of the Act applies as well to preempt state-erected entry barriers.

C. The Commission Also Has Authority Under Section 253 to Preempt State Entry Regulation of CMRS Carrier-Provided Fixed Services.

The newly enacted amendments underscore Congress' intent that CMRS spectrum be fully utilized, free of any state law barriers. Assuming arguendo that were a CMRS-provided fixed service not considered a "mobile service," newly-enacted Section

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[26] See 47 U.S.C. § 332(c)(3)(A). See also House Report at 260. ("To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.")

[27] Congress found it necessary to "preempt state rate and entry regulation" of CMRS providers to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." House Report at 260.

253 of the Act,[28] applies to preempt inhibiting state regulation of the offering.

Specifically, Section 253(a) states, in relevant part, that:

> No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[29]

Subsection (e), in turn, states that "[n]othing in this section shall affect the application of Section 332(c)(3) to commercial mobile service providers."[30] Thus, to the extent that a "mobile service" is involved, Section 332 applies. However, Section 253 covers any other service offerings not protected by Section 332, i.e., non-CMRS, from state and local entry barriers.[31]

In sum, Section 332, viewed in conjunction with Section 253, provides the Commission jurisdiction to preempt state attempts to regulate the fixed service offerings of CMRS carriers.

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[28] 47 U.S.C. § 253.

[29] 47 U.S.C. § 253(a).

[30] 47 U.S.C. § 253(e).

[31] By the terms of the statute, it appears that if a state or locality attempts to regulate the "non-CMRS" offerings of a CMRS carrier, the Commission, after notice and comment, would be obligated to preempt such regulation. See 47 U.S.C. § 253(d).

CONCLUSION

For these reasons, CTIA respectfully requests that the Commission adopt the proposed rules authorizing all CMRS providers to provide fixed services.

Respectfully submitted,

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